

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OCT 20 2008

JAMES R. LARSEN, CLERK
YAKIMA, WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LENNON RAY HESSDORFER,

Defendant.

NO. CR-08-2023-LRS

**AMENDED MEMORANDUM
OPINION**

A sentencing hearing was conducted in this matter on October 16, 2008. Donald E. Kresse, Esq., appeared on behalf of the Government. Ben Hernandez, Esq., appeared on behalf of the Defendant.

During the hearing, counsel agreed that the court could consider an Affidavit of Probable Cause which had been filed in Snohomish County Superior Court, Case Number 97-1-02924, in connection with Defendant's conviction pursuant to RCW 10.99.040 for violating a domestic no contact order by intentionally assaulting another person. An uncertified copy of the Affidavit of Probable Cause is appended as an exhibit to this memorandum opinion and has been made part of the record in the captioned matter.¹ Although counsel for Defendant consented to the court's consideration of the Affidavit, he maintained

¹ The Affidavit of Probable Cause is referred to in the Pre-Sentence Report at Paragraph 61. At the request of the court, the author of the Pre-Sentence Report supplied the court with a copy of the Affidavit.

1 his objection that the record, including the Affidavit (which had not been
2 presented by the United States), did not support a finding that the aforementioned
3 Snohomish County conviction was for a “crime of violence” as defined in
4 U.S.S.G. §4B1.2(a).

5 For the reasons it provided during the sentencing hearing, and employing a
6 modified categorical analysis, the court finds that the record, including the
7 Affidavit of Probable Cause, supports the conclusion that Defendant’s conviction
8 was for a “crime of violence.”

9 Pursuant to a modified categorical approach, the court may examine
10 statements of the factual basis of the charge, including a charging document, a
11 transcript of the plea colloquy, a written plea agreement presented to the court, “or
12 a record of comparable findings of fact adopted by the defendant upon entering the
13 plea.” *Shepard v. United States*, 544 U.S. 13, 20-21, 125 S.Ct. 1254 (2005). See
14 also *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1132 (9th Cir. 2006) (under this
15 approach, the court considers whether any of a limited set of specific documents,
16 including “the state charging document, a signed plea agreement, jury instructions,
17 guilty pleas, transcripts of a plea proceeding and the judgment,” show the
18 petitioner’s conviction entailed an admission to, or proof of, the necessary
19 elements of a crime of violence). “[D]ocuments used to satisfy a modified-
20 categorical analysis must meet a ‘rigorous standard.’” *United States v. Navidad-*
21 *Marcos*, 367 F.3d 903, 908 (9th Cir. 2004). “[M]ight simply cannot be enough.”
22 *Id.* The government must demonstrate that the record “unequivocally establishes
23 that the defendant was convicted of” a “crime of violence.” *Id.*

24 In his “Statement Of Defendant On Plea Of Guilty” filed in Snohomish
25 County Superior Court, the Defendant indicated as follows: “On or about
26 December 9, 1997 in Snohomish County, WA I did push Sheri Keith, which is an
27 assault, in violation of a no contact order that I knew existed and was valid.” (Ex.
28 B to Ct. Rec. 30 at p. 11). This alone does not “unequivocally” establish that the

1 Defendant was convicted of” a “crime of violence” because the “push” referred to
2 could just as well have amounted to no more than an unlawful “offensive”
3 touching which did not involve use of substantial physical force, nor serious
4 potential risk of physical injury. See *United States v. Sandoval*, 390 F.3d 1077,
5 1081 (9th Cir. 2004) (under the categorical approach, Third Degree Assault does
6 not qualify as a “crime of violence,” as that term is defined in U.S.S.G. §4B1.2,
7 because under Washington law, it is possible to commit Third Degree Assault
8 “through an unlawful touching that does not involve substantial physical force or
9 seriously risk physical injury”). In Washington, there are three common law
10 definitions of assault, one of which is intentional touching, striking, cutting, or
11 shooting of another person, with unlawful force, that is harmful or offensive
12 regardless of whether any physical injury is done to the person. *State v. Smith*,
13 159 Wn.2d 778, 781, 154 P.3d 873 (2007); Washington Criminal Pattern Jury
14 Instruction 35.50.

15 The Affidavit of Probable Cause appended hereto is referred to in the “Plea
16 Agreement” which the Defendant signed in conjunction with his conviction under
17 RCW 10.99.040. In the “Plea Agreement,” a box is checked next to Paragraph 2B
18 “Sentencing Facts” which states: “Facts to be considered for imposing a standard
19 range sentence are as set forth in the affidavit(s) of probable cause filed herein.”
20 (Ex. B to Ct. Rec. 30 at p. 13). An “Appendix C To Plea Agreement” says the
21 identical thing at Paragraph B which is also “checked.” (*Id.* at p. 16). A “Plea
22 Agreement” is one of the enumerated court documents the court can rely upon to
23 show a conviction entailed an admission to, or proof of, the necessary elements of
24 a “crime of violence.” Here, the Affidavit of Probable Cause was incorporated by
25 reference into the “Plea Agreement” with the consent of the Defendant who agreed
26 that the facts contained in the affidavit could be used for the purpose of sentencing
27 him in Snohomish County Superior Court. The Affidavit is “a record of
28 comparable findings of fact adopted by the defendant upon entering the plea.”

1 The Affidavit unequivocally establishes that Defendant was convicted of a "crime
2 of violence" involving use of substantial physical force or serious risk of physical
3 injury

4 Accordingly, Defendant's Base Offense Level is 20 pursuant to U.S.S.G.
5 §2K2.1(a)(4)(A), and his Total Offense Level is 17 after a three level reduction for
6 acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The resulting guideline
7 range is 30-37 months based on a Criminal History Category of III.

8 The District Court Executive shall provide copies of this Amended
9 Memorandum Opinion to counsel and to the U.S. Probation Office.

10 **DATED** this 20th day of October, 2008.

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14 LONNY R. SUKO
15 United States District Judge
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FILED

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTYPAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.

THE STATE OF WASHINGTON,

Plaintiff,

v.

HESSDORFER, LENNON RAY,

Defendant.

No. 97-1--0202-4

AFFIDAVIT OF
PROBABLE CAUSE

97-1-02024-1

2

Aliases:

Other co-defendants in this case:

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that I am a Deputy Prosecuting Attorney for Snohomish County, Washington, and make this affidavit in that capacity; that criminal charges have been filed against the above-named defendant(s) in this cause, and that I believe probable cause exists for the arrest of the defendant(s) on the charges because of the following facts and circumstances:

According to police reports, witness statements, and evidence gathered by the Edmonds Police Department, on 12-9-1997, the defendant assaulted Shari Keith, the protected party named in a valid no contact issued out of Edmonds Municipal Court.

The no contact order was issued on April 21, 1997 and is still in effect.

This incident occurred at 8201 Lake Ballinger, apartment #3, Edmonds, Snohomish County, Washington.

The victim is five months pregnant.

The victim writes in her statement that she asked the defendant about a drink of his beer that he had been hiding. He argued with her and said he should just hit her, then he pushed her into the kitchen wall. She pushed him off of her. He continued to push her, then hit her in the face several times. He pushed her onto the sofa to where she couldn't breath for about one to two minutes. Then she tried to get him out of the apartment. He wouldn't go so she tried to leave. He still pushed and hit her again. Finally she go out and called 911.

Officer Cameron responded to the 911 call. Dispatch advised the caller was in Apartment #16, and the male half had left on foot, possibly en route to Scott's or Coco's Restaurant. Dispatch also advised of a valid no contact order in effect.

Officer Cameron located the defendant inside Coco's. He smelled of alcohol. He said he was at his apartment when the victim had come by and started "hassling" him, so he left. He agreed to return to the location of the incident.

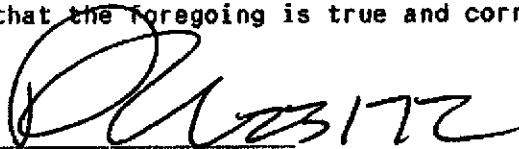
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Upon arrival Officer Cameron observed the living room coffee table was broken as well as a statuette, and a couch pillow was laying across the eating area. In general the apartment was neat and well kept. Clearly both parties had been residing in the apartment. She told the officer what happened. Aid was called to check on the victim due to the location of the stomach punch. She was not transported to the hospital.

Officer Isackson took photographs of the victim. Her face was red and puffy. Welts had started to rise up. A mark on her neck had also started to bruise.

The defendant has no felony convictions. However, he has a April 1996 Assault 4 conviction, May 1996 Assault 4 arrest, April 1, 1997 Assault 4 arrest, and an April 18, 1997 Assault 4 arrest which resulted in a Conviction. Based on the victim's pregnancy, and the recent domestic violence history, the state would respectfully request bail be set at \$20,000.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



HELENKA M. KOLTONOWSKA, #23172
Deputy Prosecuting Attorney

DATED December 12, 1997, at the Snohomish County Prosecutor's Office.